EU Military Procurement Regulation vs.
Global Security Politics

Nathan Meershoek
N.A.Meershoek@uu.nl

RENFORCE
COCOT Conversation
29 November 2021
The EU’s challenge of regulating military procurement in a context of national sovereignty

- Directive 2009/81/EC on public contracts in the fields of defence- and security

- **Aim and means:** fostering the EU’s strategic autonomy through – internal market-based - procurement liberalisation

- **Limited impact on European military industries:**
  - because Member States still predominantly rely on Article 346 TFEU to procure domestically based on their exclusive national security competence (Article 4(2) TEU)
  - because intergovernmental frameworks are generally excluded from the application of the Directive

- **Underlying problem:**
  - The function of military procurement is rooted in the military logic of global security politics while its regulation is based on the economic logic of the internal market
    - Wrong legal basis?
The function of military procurement (the *military logic*): the conceptual roots of the problem
The function of military procurement (the military logic): the conceptual roots of the problem

• The function of military procurement is to maintain and/or increase military power which is considered a crucial asset to a state’s national security
  • by procuring equipment superior to that of (potential) rivals
    • in addition, states seek to:
      • strengthen domestic industries to increase military independence
      • strengthen military interdependence within alliances (EU or NATO)

• The security approach of the EU Treaties:
  • military power (like the function of military procurement) is conceptually rooted within national sovereignty and intergovernmental alliance (Art. 4 TEU and Art. 42 TEU)

  • it should contribute to national security as well as European and global peace & security (so should its regulation) (Art. 3 and Art. 4 TEU)
    • How does this affect procurement regulation?
Looking forward:
Addressing the EU’s challenge by legal research
How to address the EU’s challenge from the perspective of (value-based) EU law?

• Approach the regulatory problem from its roots (law & politics) by distinguishing between the source (political sovereignty) and purpose of military authority (peace & security)

  i. the international context of security politics based on the concept of military power and the function of military procurement therein
     • interdisciplinary approach to understand the potential effectiveness of regulation

  ii. the meaning of national sovereignty within EU law in light of the EU’s constitutional purpose (Article 3(1) TEU)
      • how does this affect the systematic and teleological legal interpretation of security derogations and the legitimacy of the EU?

  iii. prospects for better regulation
      • building on a theoretical framework in which the concepts of national security, sovereignty and European peace & security are understood in light of the EU’s constitutional purpose and its division of competences
The function of military procurement in accordance with EU law?

• The described function fits international- and primary EU law as

  • there is no general prohibition on arming (ICJ, U.S. v. Nicaragua) for effective self-defence

  • territorial integrity and national security are ‘essential state functions’ (Article 4(2) TEU)

  • protection of domestic industry can be justified when the industry is “of fundamental importance for a country's existence” (CJEU 72/83, Campus Oil, 1984)

  • National security should not be considered in isolation of international peace & security (CJEU, C-83/94, Leifer and C-70/94, Werner 1995)

  • NATO obligations may take precedence over EU secondary law obligations (Article 42(7) TEU and Article 351(1) TFEU)